

2215688 (Migration) [2023] AATA 1050 (19 April 2023)

DECISION RECORD

DIVISION: Migration & Refugee Division

REPRESENTATIVE: Ms Tianran Liu

CASE NUMBER: 2215688

MEMBER: Meena Sripathy

DATE: 19 April 2023

PLACE OF DECISION: Sydney

DECISION: The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass (155) (Five Year Resident Return) visa.

Statement made on 19 April 2023 at 12:53pm

CATCHWORDS

MIGRATION – cancellation – Return (Residence) (Class BB) visa – Subclass (155) (Five Year Resident Return) – incorrect information in the visa application – exclusive relationship – child born to the applicant's former partner – relationship ended in divorce – accounts continued in joint names – paternity claim unsupported – power to cancel the visa does not arise – decision under review set aside

LEGISLATION

Migration Act 1958, ss 5(1), 97-105, 107-109, 116
Migration Regulations 1994, r 2.41

CASES

Briginshaw v Briginshaw (1938) 60 CLR 336
Cao v Minister for Immigration and Anor (2007) FMCA 225
Gido-Christian v MIAC [2007] FMCA 825
Kumar v MIMA [1999] FCA 156
McDonald v D-G of Social Security (1984) 1 FCR 354
Mian v MILGEA (1992) 28 ALD 165
MIEA v Wu Shan Liang (1996) 185 CLR 259
Nagalingam v MILGEA (1992) 38 FCR 191
NBDY v MIMA [2006] FCAFC 145
Saleem v MRT [2004] FCA 234
SCAN v MIMIA [2002] FMCA 129
Singh v MIEA [1994] FCA 1534
Swan Television & Radio Broadcasters Ltd v ABT (1985) 8 FCR 291
Tarasovski v MILGEA (1993) 45 FCR 570

Yesmin v Minister for Immigration, Citizenship and Multicultural Affairs [2022]
FedCFamC2G 483
Zhao v Minister for Immigration and Multicultural Affairs [2000] FCA 1235

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass (155) (Five Year Resident Return) visa under s 109(1) of the *Migration Act 1958* (Cth) (the Act).
2. The delegate cancelled the visa on the basis that the visa holder did not comply with s101(b) and 104 of Subdivision C of the Act and having considered the prescribed matters set out in r.2.41. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant appeared before the Tribunal on 30 March 2023 to give evidence and present arguments. The Tribunal also received oral evidence from [Supervisor A], her supervisor at her present workplace. Her aunt was also available if necessary to give evidence by phone from China, but the Tribunal did not consider it necessary. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
4. The applicant was represented in relation to the review.
5. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The applicant applied for a Prospective Marriage (Subclass 300) visa on 3 July 2013, sponsored by [Mr A], an Australian permanent resident, which was granted on 6 May 2014. She arrived in Australia [in] May 2014. On 2 July 2014, the applicant lodged an application for a Combined Partner (subclass 820/801) visa. On 3 July 2014 she was granted the temporary partner (Subclass 820) visa.
7. In September 2016 the applicant provided documents and evidence to the Department in support of the second stage processing of the Partner application, including Statutory Declarations dated 2 July 2016 from herself and her partner, [Mr A]. On 17 June 2017 the applicant was granted the permanent partner (Subclass 801) visa.
8. On 10 July 2022 the applicant was granted a Resident Return (Subclass) 155) visa.
9. **Notice of Intention to Consider Cancellation (NOICC)**
10. On 13 September 2022 the applicant was issued a NOICC in relation to her Resident Return (Subclass 155) visa.
11. The non-compliance identified and particularised in the s 107 notice was non-compliance with s101 and s104 of the Act in the following respects:
 - The following information contained in Statutory Declarations dated 2 July 2016 provided by the applicant and her partner is incorrect and constitutes non compliance with s101(b) of the Act:

"I, [applicant's name] of [Address 1], [stated occupation], make the following declaration under the Statutory Declarations Act 1959:

That I have a mutual commitment to a shared life as a husband and wife, or as a de facto partner, or as an interdependent partner, to the exclusion of all

*others, with [Mr A];
That our relationship is genuine and continuing
That [Mr A] and I live together
That our relationship began in 2012 and we have lived together for 2
years.....*

*"I, [Mr A] of [Address 1], [stated occupation], make the following declaration
under the Statutory Declarations Act 1959:
That I have a mutual commitment to a shared life as husband and wife, or as
a de facto partner, or as an interdependent partner, to the exclusion of all
others, with [the applicant].
That our relationship is genuine and continuing.
That [the applicant] and I live together
That our relationship began in 2012 and we have lived together for two
years....We are definitely committed to a long-term relationship...."*

It was alleged the applicant and her partner provided incorrect information because information before the Department indicates her partner was the biological father of a child born on [a day in] 2016 and was therefore not in an exclusive relationship with the applicant in this period.

- The answers provided in the applicant's Form 47SP at Questions 53 (Your fiancé or partner's children (including from previous marriages/relationships)) and Question 54 (All your fiancé or partner's dependents (including any dependent children)) became incorrect on [the date in] 2016 when [Child A] was born.

12. It was alleged the applicant failed to comply with s104 of the Act because she did not advise of the change of circumstance of the birth of the sponsor's child prior to the grant of the visa.

13. The NOICC referred to the following evidence before the Department supporting the alleged non compliance:

- Her (now former) spouse, [Mr A] provided the Department information that he is the biological father of a male Australian citizen child [Child A] born [in] 2016, who is the son of the applicant's maternal cousin, [Ms A].
- Department records indicate [Ms A] and [Mr A] have recorded the same residential address with the Department for a number of years, including prior to the child's birth.
- Departmental movement records show [Mr A] and [Ms A] having undertaken travel together on a number of occasions, including to [Country 1] in January 2016 when the applicant remained in Australia.
- A nine month gestation period and birth date of the child being [as specified in] 2016 suggests the child was conceived in or around November 2015. This means the applicant and her spouse were not in a relationship with a mutual commitment to a shared life as husband and wife to the exclusion of all others and the applicant may not have continued to meet the definition of spouse under s5F of the Act.

14. On 26 September 2022 the applicant responded to the NOICC with a Statutory Declaration of that date. In her statutory declaration the applicant provided the following information:
- The first she has heard that her ex-husband [Mr A] was the biological father of [Child A] was when she received the NOICC on 13 September 2022. This information was devastating to her.
 - She still cannot accept that her ex husband is the father of [Child A].
 - She does not accept the allegation by the Department that she provided incorrect information in her partner visa application.
 - She maintains she was in a genuine and continuing relationship with her ex husband [Mr A] until the breakdown of their relationship. She describes the reasons for her belief, including that they were each other's first loves and had been through a lot together.
 - She explains the circumstances of the [Country 1] travel and why she did not travel with [Mr A] on that trip.
 - She explains her understanding of the relationship between [Mr A] and her cousin [Ms A], which she believed was as good friends for many years.
 - She explains why she never thought [Mr A] would be [Child A's] biological father. If he claims to have had significant involvement in [Child A's] life, everyone in her family including herself, her aunt, her grandparents all did also.
 - She claims she discussed with [Mr A] and agreed to provide financial assistance to [Ms A] since [Child A's] birth because she was a single mother.
 - The more she considers all of this, she has doubts whether [Child A] is really [Mr A's] child.
 - She describes the circumstances which eventually led to her separation in 2019 and later divorce in 2021 from [Mr A].
 - In summary she reiterates that she never knew that her ex husband was the father of [Child A]. She has never provided incorrect information to the Department and disputes that [Mr A] was in a de facto relationship with [Ms A] during her marriage. She disputes she failed to comply with s101(b) or s104.
15. The delegate decided to cancel the applicant's visa on 25 October 2022, having considered the applicant's response to the NOICC and the relevant legislation in the Act and Regulations.
16. *Evidence before the Tribunal*
17. On 8 March 2023 the Tribunal issued a summons to the Department for the original Combined Partner Subclass 820/201 file [number], as this file was not included among the documents provided by the Department. Various documents from the requested file were uploaded to the Tribunal on that same date.
18. On 28 March 2023 the Tribunal received a submission from the applicant's representative and the following documents in support:

- Statutory Declaration by the applicant dated 23 March 2023.
- Various documents relating to the applicant's employment history in Australia, including letters of employment, payslips, ATO income statements.
- Evidence relating to applicant's volunteer work and donations.
- Letter from [name], applicant's GP dated 19 March 2023 relating to her health issues.
- Psychologist Report by [name] relating to an assessment undertaken on 10 November 2022, followed by two treatment sessions in December 2022 and March 2023.
- Statutory Declaration by [Mother A], applicant's mother dated 23 March 2023
- Support letter from [Friend A], dated 22 March 2023, friend of the applicant.
- Support letter from [Aunt A] dated 20 March 2023, aunt of the applicant.
- Support letter dated 22 March 2023 from [Colleague A], work colleague and friend of the applicant.
- Reference letter from applicant's current employer, [named] dated 17 March 2023.

19. The representative's submissions, dated 27 March 2023, make the following points:

- The evidence before the Tribunal is insufficient for it to be satisfied that [Mr A] was being unfaithful to the applicant in 2015 and was not committed to a shared life with her to the exclusion of all others.
- Reference is made to the recent decision of the Federal Court in *Yesmin v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FedCFamC2G 483 where the Tribunal was found to have been in error for failing to consider the state of mind of the applicant at the relevant point in time relating to the grant of the Partner visa, and there was insufficient evidential basis for the Tribunal's conclusion.
- The evidence before the Tribunal in this case concerning the relationship between [Mr A] and [Ms A] in 2015 is vague and there is nothing to suggest that the applicant was subjectively of the view that the relationship between [Mr A] and [Ms A] was incompatible with her relationship with [Mr A].
- Conversely, the support letters from [Friend A], [Colleague A], [Aunt A], and the statutory declaration from [Mother A] all indicate that they firmly believed the applicant was not aware of the [Mr A] is [Child A's] biological father until she received the letter from the Department.
- Therefore, the Tribunal should not find that the statutory declarations completed in 2016 contained incorrect information.
- In any event, an extra marital relationship, of itself, does not render a person's marriage to not meet the requirements of s5F, noting this was conceded by

the Minister in the matter of *Yesim* and support for which can be found in the observations of Riley FM in *Cao v Minister for Immigration and Anor (2007) FMCA 225*.

- The only evidence before the Tribunal that [Mr A] fathered a child in 2015 is his legal representative's written submission to the Department provided as a reason not to cancel his own visa. This is not objective evidence it is unsworn and 'double hearsay'. There is no direct evidence from [Mr A] or [Ms A]. There is no DNA evidence. There is no evidence of child support claims or payments. The birth certificate does not name a father.
- Comments are made regarding the circumstantial evidence of the statement from the childcare centre, noting that the child [Child A] started at the centre when he was 1 ½ years old which would have been around mid 2018; the statement was given in 2022 following cancellation of [Mr A's] visa; the reference to [Mr A's] volunteer [work] for three years implies the years 2020-2022. However the applicant and [Mr A] separated in 2019 and [Ms A] and [Mr A] are now apparently in a de facto relationship. The evidence from [Child A's] childcare centre substantially relates to the period in which [Mr A] has been in fact a parent of [Child A] through his current relationship with [Ms A]. Accordingly, the probative value of the childcare evidence is very slight.
- This evidence is simply insufficient to support a finding by the Tribunal that [Mr A] is the biological father of [Child A]. Accordingly, there was no relevant change of circumstances to report.
- Should the above not be accepted, the submissions go on to address the matters prescribed in r.2.41 of the Regulations required to be considered in the exercise of the discretion whether or not to cancel. Specifically, information is provided about the present circumstances of the applicant relating to her current employment and employment history, health circumstances and the impact on her life and future prospects if the visa is cancelled and she is required to return to China after 9 years in Australia. Reference is also made to the consequential impact on the applicant's mother, who has been residing in Australia since 2019 after her father died, and in respect of whom the applicant has sponsored for a Contributory Parent visa.

Tribunal hearing

20. At hearing the applicant explored with the applicant matters arising from her Statutory Declarations and other information before it. She is presently living in [a named suburb] with her mother. She has been at this address since September 2019 when she moved out of her home [at Address 1] where she lived with her (now) ex-husband and her cousin, [Ms A]. She is working full time at [her current employer] since around August 2021.
21. The Tribunal asked the applicant about her relationship with her cousin [Ms A]. She explained she is her mother's brother's daughter and they were close since childhood, as both were only children. [Ms A] came to Australia around 2008 with her mother. Subsequently she married a man the applicant only knows as "[name]", this was when the applicant was at university in Nanjing so she only heard about it by phone. They had two children together and then separated. They separated around the time that the applicant arrived in Australia to settle in 2014. After that the applicant, her husband [Mr A] and [Ms A] and her children moved to [Address 1] together. Prior to that [Mr A] had been living with [Ms A] for some years. The applicant did not provide any other details about [Ms A's] former

husband, such as his full name, nationality or residence status, stating that she did not know this information.

22. The Tribunal asked the applicant about the travel history of [Ms A] and [Mr A]. She confirmed that they travelled together in 2010 when she first met [Mr A] because they were friends and his hometown was close to hers. [Mr A] travelled again to visit the applicant in 2012, in Nanjing where she was studying. When asked if her cousin accompanied him on that visit she said he came alone to Nanjing but her cousin may have visited her hometown at that time. The Tribunal asked about the travel history after the application for the Partner visa was lodged. She said in 2015, she, her cousin and aunt travelled to China together and [Mr A] joined them later and they all travelled back together. In January 2016, [Mr A] and [Ms A] travelled to [Country 1] together with her children and her aunt. The Tribunal noted that she explained the circumstances of this in her Statutory Declaration and asked if she was able to provide any evidence to support that explanation such as documents of the original booking in her own name and correspondence relating to the subsequent transfer to [Ms A's] name. The applicant said she may not be able to because it was long ago and she did not make the booking arrangements, it was made by [Mr A] and through an agent. She then said that originally the arrangement was for her and [Mr A] and their landlord couple. In the end the landlord, but not his wife, went with [Mr A], [Ms A], her children and the aunt. The applicant said she travelled to China in February 2016 alone because her father was critically ill and then died. When asked why her husband did not accompany her on this visit, she said it was all a rush and initially she was called to come because he was ill, it was only when she arrived that he died. She said they travelled back together in 2017 for the one year anniversary visit. The Tribunal asked the applicant if, after this, either of them travelled again, together or alone. She said he wanted her to travel with him but she was busy with her work and career and did not want to. It was the source of some tension between them. In January 2018, she accompanied her mother to [Country 1] because her mother was required to depart and re-enter Australia to comply with her temporary visa. As [Mr A] had already been to [Country 1] he did not come with them, and instead he travelled to [another country]. He told her he was travelling with a Korean colleague. The Tribunal noted that department records before it indicates her cousin returned on that same flight and asked why they were travelling together again. The applicant said she does not know. She assumed her cousin was traveling with her mother for holidays.

The Tribunal put to the applicant that the information about the common travel history of [Mr A] and [Ms A] may cause it to have some concerns about the claim that she and he were in a genuine exclusive spouse relationship. It would take her explanations into consideration but asked if there was anything else she wished to say on this. The applicant said that most of their travel was with family and together. From her perspective she had no idea that there was anything going on between [Mr A] and [Ms A] so she was not concerned about them travelling together.

23. The Tribunal noted from the documents provided to it by the Department that very little evidence appeared to be submitted by her to support the existence of the ongoing relationship in 2016 and 2017. The only documents she provided appear to be the Statutory Declaration dated 2 July 2016, bank statements and an explanatory statement from her about the financial arrangements submitted in July 2017. It asked her to confirm if this was all she submitted. The applicant said she submitted what the Department asked for. She did not know anything else was required. She confirmed that she was not represented at that time. The Tribunal acknowledged that she was granted the Subclass 801 visa soon after the submission of these documents. It invited her to provide any further evidence of the relationship.
24. The Tribunal asked the applicant about her reaction to the receipt of the NOICC and the allegations it contained. She said initially believed it was a misunderstanding. She tried to

call [Mr A] straight away but he did not answer. She then called [Ms A] who asked her to come to her house to explain. She attended with her mother. [Mr A] was present. They explained that because the birth of [Child A] appeared to be an accident, he thought if he says he is the father he could show ties to Australia in the context of his own visa cancellation. When they heard this, the applicant said her mother was very angry and started cursing them.

25. The Tribunal asked the applicant about her relationship with [Ms A] since her separation. She said around 2018 [Ms A] moved out of their home to [Suburb 1]. After that the applicant moved out in 2019 and [Mr A] remained at that address with just the landlords. Her relationship with [Ms A] since [Ms A] moved out has been less close. They were only seeing each other on special occasions or family events. The Tribunal asked if she had any evidence to support that [Ms A] moved out. She said she does not.
26. The Tribunal asked what she knows of the relationship between [Ms A] and [Mr A] now. She said she understands they are together because that is what they told her when she confronted them after receiving the NOICC. She does not know anything more about their relationship. She said since this she and [Ms A] are not on good terms.
27. The Tribunal explained to the applicant, it will consider all the evidence and whether it is satisfied there was non compliance on her part. If it accepts there was non compliance in the manner described in the notice, will it be necessary to consider the matters set out in r.2.41 in exercising its discretion whether to cancel the visa. It notes and will take into consideration her submissions and those of the representative. It asked if she wished to add anything further on the matter of the discretion. She indicated she did not at this time.
28. The representative requested the Tribunal to take evidence from [Supervisor A] who would speak to her observation of the applicant's immediate reaction to receiving the NOICC.

29. *Evidence from [Supervisor A]*

30. The witness told the Tribunal she was involved in hiring the applicant around September 2021. She recalls a date around September or October 2022 when she came to work and saw the applicant in the toilets, very visibly upset. She asked her if she was okay, but she declined to explain. The witness then went into the office and when she could not see the applicant in her room, she walked in. She found the applicant crouched behind the door, crying and visibly distressed and having trouble breathing. The witness said she was concerned for the applicant's welfare and sat with her for some time, during which the applicant disclosed to her that she had just discovered her husband had cheated on her and had a child with that person. The witness said in her opinion what she witnessed of the applicant's response that day was that she was complete shock and devastated upon hearing the news of her husband's actions. The witness offered that she is familiar with the reaction she witnessed having had a similar personal experience and so she believes the applicant's reaction was genuine.
31. On 13 April 2023 the Tribunal received a post hearing submission and supporting documents from the applicant's representative.
32. The submission stated that the applicant continues to rely on the earlier submission dated 27 March 2023, and the arguments therein. It was noted at hearing the applicant was invited to provide further evidence to support the existence of the marriage relationship, noting the limited evidence on the Department file. In respect of this the representative stated:

We note [the applicant] was granted a Prospective Marriage (subclass 300) visa on 6 May 2014, a Partner (subclass 820) visa on 03 July 2014, and was subsequently granted a Partner (subclass 801) visa on 17 June 2017. [The applicant's] marital relationship with [Mr A]

had been assessed by the Department and the delegate was satisfied the [the applicant] met relationship requirement under Subsection 5F(1) of the *Migration Act 1958* (Cth) and all the relevant criteria for the grant of partner visa. Accordingly, assessing whether or not [the applicant] could be able to meet Subsection 5F(1) of the Act as of 17 June 2017 is not in question here.

According to Department's Procedural Advice Manual, an answer to a question is incorrect even if the person who gave the answer, or caused the answer to be given, did not know that it was incorrect. This means that a person's state of mind is irrelevant in determining whether an answer is incorrect. However, it provides that person's state of mind is relevant in considering whether to cancel the visa. We surmise that the Member affords [the applicant] an opportunity to strengthen her state of mind during the processing of Partner (subclass 801) visa that she and her then spouse [Mr A] were in a relationship where they had a mutual commitment to a shared life as a married couple, to the exclusion of all others.

33. The submission goes on to state the applicant instructs that following her separation in September 2019 and divorce in 2021, she has deleted substantial documents related to [Mr A] and this marriage, and this therefore has limited the evidence she is now able to put forward.
34. The Tribunal is requested to take into consideration the circumstances of the marriage breakdown and length of time that has passed, in assessing the following evidence relating to the relationship: 2017 tax return of [Mr A] showing the applicant declared as spouse; various car insurance documents for periods 2016-2018 addressed to the parties at the home address, including [Insurer's] Certificate of Insurance for comprehensive motor insurance in joint names for 2016-2017 & 2017-2018; correspondence from a range of sources addressed to the applicant and sponsor individually to the home address in periods between 2015-2018; phone records for applicant showing calls to sponsor's number in period April -June 2017; numerous photos of applicant and sponsor in a range of social settings including with family members in Sydney and in China; evidence of travel together in 2015 and 2017; letter form [a named finance company] dated 31 May 2016 and non-lapsing death benefit nomination form signed by him nominating the applicant. It is submitted the evidence supports that the applicant cohabited with the sponsor in the relevant period. There is no information to suggest the applicant were not in a relationship in which they had a mutual commitment to a shared life to the exclusion of all others. At no time was there any information for her to believe that [Mr A] was the biological father of the child [Child A]. She honestly believed the information she provided was correct at the time she completed the partner visa forms.
35. The representative concludes by reiterating their submission that the evidence before the Tribunal is simply insufficient for it to be satisfied that [the applicant] and [Mr A] was not committed to a shared life to the exclusion of all others. The evidence shows that the spousal relationship between [the applicant] and [Mr A] was genuine and continuing to the exclusion of all others prior to the grant of partner visa, after the grant of partner visa and to the time when the applicant and [Mr A] formally separated in September 2019. There has been no evidence suggesting that [Mr A] and her cousin have even entered any spousal relationship. It is submitted that considering the applicant's state of mind in filling her applications and evidence in support of the marital relationship between her and [Mr A], it is submitted that these factors should weigh in favour of the applicant and her visa should not be cancelled under s109 of the Act.

36. **CONSIDERATION AND FINDINGS**

37. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss 101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and

passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.

38. The exercise of the cancellation power under s 109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s 107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s 107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.

39. Did the notice comply with the requirements in s107?

40. The Tribunal has considered the validity of the NOICC. It observes the applicant has not raised any issues or otherwise contested the validity of the notice. Her response to the notice indicates that she received it and understood the allegation contained in it. The Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s 107 and that the notice issued under s 107 complied with the statutory requirements.

Was there non-compliance as described in the s 107 notice?

41. Case law authority establishes that it is not open to the Tribunal on review to decide whether there was a non-compliance other than that particularised under s.107(1)(a) in the s.107 notice.¹ The issue before the Tribunal is whether there was non-compliance in the way described in the s 107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled.
42. In the present case, the non-compliance identified and particularised in the s 107 notice is non-compliance with s101(b) and s104 of the Act in the following respects:
- That the declarations contained in the applicant's and her then sponsor, [Mr A's] Statutory Declarations dated 2 July 2016 that they each had a *mutual commitment to a shared life as a husband and wife, or as a de facto partner, or as an interdependent partner, to the exclusion of all others* were incorrect on the basis of information before the Department suggesting [Mr A] is the biological father of a child with another person, and the applicant therefore failed to comply with s101(b) of the Act.
 - That the change of circumstances of the birth of this child led the answers provided in the applicant's Form 47SP at Questions 53 (Your fiancé or partner's children (including from previous marriages/relationships)) and Question 54 (All your fiancé or partners's dependents (including any dependent children)) to become incorrect on [the day in] 2016 when [Child A] was born and the applicant failed to comply with s104 of the Act by not advising of the change of circumstance of the birth of the sponsor's child prior to the grant of the visa.
43. The first issue for the Tribunal's consideration is whether the ground of alleged non compliance is made out. In essence the allegations of non compliance are: 1) that the applicant and/or her sponsor, provided incorrect information in declaring in their Statutory Declarations of 2 July 2016 that they had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and 2) that the applicant failed to comply with the obligation to advise of a change of circumstances, being that the sponsor had a dependent child upon the birth of the child [Child A] on [the day in] 2016.

¹*Saleem v MRT* [2004] FCA 234 (Allsop J, 30 March 2004).

44. It is well established that civil law concepts such as onus and standard of proof are generally inappropriate in the administrative law context.² However, where, as in cancellation cases, the existence of facts grounds the exercise of a statutory power, the onus of establishing those facts is on the Minister (or on review, the Tribunal).³
45. Although the visa holder must be invited to show that the ground does not exist, or if it does, to show cause why the discretion should not be exercised, this does not place an onus on the visa holder to establish at that point that the visa should not be cancelled. In *Zhao v Minister for Immigration and Multicultural Affairs* [2000] FCA 1235, French, Hill and Carr JJ said at [25]:
- ‘The decision-maker, acting under s 116, must be satisfied of one or other of the matters set out in that section before the visa can be cancelled. That state of satisfaction is a real state of satisfaction which must be reached on a consideration of the available material. A visa cannot be cancelled simply because the visa holder has failed to show cause why it should not.’⁴
46. The Tribunal is mindful that *Zhao* was concerned with cancellation under s 116, however, it considers the comments are equally applicable to the operation of s 109. Furthermore, although it accepts the principles enunciated in *Briginshaw v Briginshaw*⁵ have no direct application in the context of administrative decision making,⁶ in the context of s 109 particularly where questions of fraud are involved, in deciding whether the ground for cancellation is made out it may be appropriate to bear in mind the nature of the allegations and the gravity of the consequences.⁷
47. In the present case, it is clear that the consequences which flow from a finding that the declarations made by the applicant and her then sponsor in their Statutory Declarations of 2 July 2016 were incorrect are serious, being the potential of cancellation of her permanent visa.
48. *Alleged non compliance relating to the declarations by the applicant and her sponsor made on 2 July 2016 that they each have ‘a mutual commitment to a shared life as husband and wife to the exclusion of all others’*

²*MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 282–283; *Nagalingam v MILGEA* (1992) 38 FCR 191 at 200, *McDonald v D-G of Social Security* (1984) 1 FCR 354 at 357; and *Swan Television & Radio Broadcasters Ltd v ABT* (1985) 8 FCR 291 at 297.

³*Mian v MILGEA* (1992) 28 ALD 165 at 169; *Singh v MIEA* [1994] FCA 1534 at [14]. In those cases the Court was referring to the burden of proving relevant facts said to attract s 20 as in force before 1 September 1994, which in turn attracted the deportation power, but the principle would be equally applicable to visa cancellation.

⁴ While *Zhao* related to cancellation under section 116 rather than section 109, as in the present case, I consider that the principles are equally applicable to cancellation under section 109.

⁵*Briginshaw v Briginshaw* (1938) 60 CLR 336. where Dixon J held at 362 that in civil matters, ‘the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal [of fact]’.

⁶ See *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 282, *Kumar v MIMA* [1999] FCA 156 at [35], *SCAN v MIMIA* [2002] FMCA 129 at [10], and the cases discussed.

⁷ In *Tarasovski v MILGEA* (1993) 45 FCR 570 at 572–73 and *Singh v MIEA* [1994] FCA 1534 at [16]. The Tribunal’s reliance on *Tarasovski* and *Singh* in the context of s 109 was approved in *NBDY v MIMA* [2006] FCAFC 145 and *Gido-Christian v MIAC* [2007] FMCA 825.

49. The basis of this allegation as described to the applicant in the NOICC, is information before the Department provided by the sponsor, [Mr A], that he is the biological father of the child of [Ms A] born in [2016] and he is in a de facto relationship with the child's mother, [Ms A]. The corollary of this information is that the child would have been conceived in or around November 2015. The NOICC also referred to Departmental travel movement records that show [Mr A] and [Ms A] having undertaken travel together on a number of occasions without the applicant and a common residential address for both of them.
50. Department file documents provided to the Tribunal indicate that the stated 'information' was contained in submissions from a legal representative provided on behalf of [Mr A] in response to a NOICC he had been issued relating to his own permanent visa.⁸ As identified by the applicant's representative in their submissions, this 'evidence' is little more than an assertion by [Mr A's] legal representative that he is the father of [Child A], made in the context of submissions for why his own visa should not be cancelled. The submissions added that the legal representative was also instructed that [Ms A] and [Mr A] were not in a married spousal relationship at that time.
51. It appears the Department had a copy of the child's birth certificate which did not indicate [Mr A] was registered as the father and therefore, in the context of [Mr A's] own cancellation process, it subsequently requested from his legal representative further evidence of [Mr A's] paternity. In a further submission in response⁹ the legal representative advised they were instructed that [Ms A] can 'confirm, and firmly believes' that he is the biological father, and they instruct the reason they decided not to include [Mr A's] name on the birth certificate was that they were neither in a married spousal or de facto relationship and [Ms A] felt she would be ethically shamed and blamed by her family and relatives if he was named. Further assertions are made regarding the claimed involvement in the child's life and a support letter from a childcare centre director was provided. The support letter indicates the child has been attending since the age of one and half (based on the child's date of birth this means around early 2018), and provides observations relating to the parent-child relationship between [Mr A] and the child. No other evidence to evidence the paternity of [Mr A] in respect of the child [Child A] was provided. Specifically, the Tribunal observes despite the specific request for further evidence no amended birth certificate, DNA analysis, or any sworn evidence from [Mr A] or [Ms A] was provided.
52. In her response to the NOICC and in her evidence to the Tribunal, the applicant has consistently maintained that receipt of the NOICC was the first time she heard that [Mr A] is the biological father of [Ms A's] son, [Child A]. Her response was provided in her first Statutory Declaration response to the NOICC, dated 26 September 2022, and repeated again in her more recent Statutory Declaration dated 23 March 2023. She gave the same evidence to the Tribunal at hearing. She says she was shocked and devastated by this news. The evidence of the witness, [Supervisor A], to the Tribunal of witnessing the applicant's distress at work in or around this time in September or October 2022, supports the applicant's claim of the timing of receiving this information. The Tribunal notes various support letters and Statutory Declarations from close friends and family members support her response.
53. Apart from the alleged paternity of the child of [Ms A], the other information referred to in the NOICC to support the allegation of the incorrect declaration is that the same address has been recorded for [Mr A] and [Ms A] in Department records for a number of years and Department movement records of [Mr A] and [Ms A] show travel on the same dates on a number of occasions.

⁸[File number] contained in [file number]

⁹[File number] contained in [file number]

54. The applicant addressed both of these matters in her Statutory Declaration responses, and they were further explored with her during the hearing. Following the hearing, at the invitation of the Tribunal the applicant submitted various documents and evidence to support the existence of a genuine spouse relationship between herself and [Mr A] in the
55. Having carefully considered the available material, the Tribunal concludes there is insufficient, if any, evidential basis to support the conclusion that the declarations made by the applicant and sponsor on 2 July 2016 that they have *a mutual commitment to a shared life as husband and wife to the exclusion of all others* are incorrect. It is not satisfied, on the evidence before it, that the sponsor [Mr A] is the father of the child, [Child A], despite his asserted claim of paternity.
56. The only 'evidence' on which this is based is that contained in the submissions from [Mr A's] legal representative responding to a visa cancellation process that had been initiated against him in July 2022. Despite a specific request for further evidence to substantiate this asserted claim, only a further assertion via his legal representative was provided.
57. There is no evidence before the Tribunal that [Mr A] is, or has applied to be, registered as the father on the child's birth certificate. The copy of the birth certificate acquired by the Department shows no named father. There is no evidence or information indicating financial obligations for child support, or parenting or other court orders referring to [Mr A] as the father of the child. The Tribunal observes the delegate considering the visa cancellation of [Mr A], in respect of which this claim was made, noted the limited evidence as to the relationship and did not accept that he was the father of the child as claimed. The Tribunal finds it curious to note that the same delegate, who was unable to make a conclusive finding that he was the father of this child on the basis of a lack of probative evidence, nevertheless considered it appropriate to initiate the present cancellation process against the applicant on the strength of the mere assertion and little else.
58. The Tribunal has considered the information that the same address is recorded for [Mr A] and [Ms A] in Department records for a number of years and Department movement records of [Mr A] and [Ms A] showing travel on the same dates on a number of occasions. Regarding the common address, the Tribunal accepts the applicant's explanation about the living arrangements between herself, the sponsor and [Ms A] and her evidence about the history and nature of their relationship. It accepts that they all lived together at the same address since the applicant's arrival in Australia and for most of the period of the relationship. It accepts that this reasonably explains the common address recorded for both individuals in the relevant period. Without more, the Tribunal considers the fact that they lived together at the same address, of itself is insufficient to substantiate a finding that the applicant and sponsor did not have a mutual commitment to a shared life to the exclusion of all others.
59. The Tribunal explored at some length with the applicant at hearing the matter of the movement records. It noted that [Mr A] and [Ms A] travelled on the same dates on multiple occasions both prior to and during their relationship. The applicant provided explanations for each of these trips, maintaining that her cousin and the sponsor were close friends before her cousin introduced her to him; they all lived together for some years; and travelled as a family group on several occasions. She also gave evidence that her cousin was married herself and had two children, although she gave the Tribunal limited information about her cousin's former husband upon which it could have made further enquiries. The Tribunal observes that the grant of the applicant's Partner visa in July 2017 was made by the Department on the basis of minimal evidence of the ongoing relationship, but when this was pointed out to her at hearing she said she provided what the Department asked for, being bank statements and an explanation of her financial arrangements. Following the hearing, at the Tribunal's invitation, she provided some further evidence addressing other aspects of the

relationship, albeit limited by the circumstances that the relationship had now broken down and a substantial passage of time has passed.

60. The Tribunal acknowledges there is material before it, specifically the evidence of movement records for [Mr A] and [Ms A] and evidence that they shared an address in the relevant period, that potentially raises suspicion about the true nature of the relationship between [Mr A] and [Ms A] in this period. The Tribunal has considered this and the applicant's responses. In the circumstances of all of the material before it, the Tribunal has no basis to conclude that her explanations are not credible or plausible. The documentary evidence provided to the Tribunal that she and the sponsor were in a genuine and continuing spouse relationship in the relevant period further support her claim, including evidence that the sponsor declared her as his spouse in his tax return, that he nominated her as a beneficiary for the purposes of superannuation, a comprehensive motor vehicle insurance policy in joint names and correspondence sent to each of them at the same address supporting that they cohabited throughout this period. Other than the movement records and record of common address, there is no other probative evidence or information before the Tribunal to support a finding that the applicant and sponsor were not in a genuine spouse relationship exclusive of all others, in this period, within the meaning of that term as defined in s5F of the Act.
61. Therefore, in the absence of probative evidence to support a conclusion that the parties were not in a genuine relationship or that [Mr A] was in a spouse or de facto relationship with [Ms A] or someone else in this period, the Tribunal finds that there is insufficient evidence to conclude that the applicant or sponsor gave incorrect information in their declarations of 2 July 2016. In the context of reviewing a cancellation process initiated by the Minister, the Tribunal does not consider it necessary or appropriate to undertake any more investigations or seek out information to substantiate the allegation of non compliance, and has not done so.
62. *Alleged non compliance relating to applicant's obligation to advise of a change of circumstances following the birth of the child [Child A] in [2016]*
63. Given that the Tribunal is not satisfied on the material before it that [Child A] is the biological child of the sponsor, it follows that the applicant had no obligation to advise of any relevant change of circumstances following the birth of the child.
64. For these reasons, the Tribunal finds that there was no non-compliance by the applicant in the way described in the s 107 notice.
65. As the Tribunal is not satisfied that there was non-compliance by the applicant in the way described in the notice given under s 107 of the Act, it follows that the discretionary power to cancel the applicant's visa does not arise.

DECISION

66. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass (155) (Five Year Resident Return) visa.

Meena Sripathy
Member

ATTACHMENT – *Migration Act 1958* (extracts)

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document***, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: ***Bogus document*** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

104 Changes in circumstances to be notified

- (1) If circumstances change so that an answer to a question on a non-citizen's application form or an answer under this section is incorrect in the new circumstances, he or she must, as soon as practicable, inform an officer in writing of the new circumstances and of the correct answer in them.
- (2) If the applicant is in Australia at the time the visa is granted, subsection (1) only applies to changes in circumstance before the visa is granted.
- (3) If the applicant is outside Australia at the time the visa is granted, subsection (1) only applies to changes in circumstances after the application and before the applicant is immigration cleared.
- (4) Subsection (1) applies despite the grant of any visa.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
 - (a) giving particulars of the possible non-compliance; and
 - (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:

- (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
 - (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
 - (d) setting out the effect of sections 108, 109, 111 and 112; and
 - (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
 - (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
 - (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
 - (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

108 Decision about non-compliance

The Minister is to:

- (a) consider any response given by a visa holder in the way required by paragraph 107(1)(b); and
- (b) decide whether there was non-compliance by the visa holder in the way described in the notice.

109 Cancellation of visa if information incorrect

- (1) The Minister, after:
 - (a) deciding under section 108 that there was non-compliance by the holder of a visa; and
 - (b) considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and
 - (c) having regard to any prescribed circumstances;
 may cancel the visa.
- (2) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by the regulations to be circumstances in which a visa must be cancelled.